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No 170

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1946

THOMAS BULLITT DIXON,
Petitioner,

vs.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INCORPORATED; PHILIPP, SAWYER, RICE & KENNEDY; JAMES J. KENNEDY, JR.; FISH, RICHARDSON & NEAVE; HENRY R. ASHTON; JOHN McGLONE,
Defendants.

Civil Action File No. 20-255 To set aside as null and void Decree in E-65-141 and have new trial ordered on ground Decree was "procured to be made" as result of Fraud.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

THOMAS BULLITT DIXON,
Petitioner, Pro Se.

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THOMAS BULLITT DIXON, *Petitioner,* *vs.* AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INCORPORATED; PHILIPP, SAWYER, RICE & KENNEDY; JAMES J. KENNEDY, JR.; FISH, RICHARDSON & NEAVE; HENRY R. ASHTON; JOHN MCGLONE, *Defendants.*	Civil Action File No. 20-255 To set aside as null and void Decree in E-65-141 and have new trial ordered on ground Decree was "procured to be made" as result of Fraud.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Thomas Bullitt Dixon, respectfully prays for a Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit, to review a judgment of that court entered February 3rd, 1947.

A transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith in accordance with Rule 38 of this Court.

Summary and Short Statement of the Matter Included

Petitioner by this petition seeks to bring before this Court for review a decision of the Circuit Court of Appeals for the Second Circuit affirming a Judgment of Judge BRIGHT in the District Court for the Southern District of New York in a suit, Civil Action File No. 20-255, to set aside as null and void Decree in a prior suit, E.65-141, and have a new trial ordered on ground said decree had been "procured to be made" as result of Fraud, the said decree in said prior suit having held the claims of the patent sued on to be good and valid in law but not infringed by defendants. In his instant suit plaintiff has filed an original bill in the nature of a bill of review and has presented facts which he believes and has contended show conclusively that the facts upon which the winning of his said prior suit as to infringement *necessarily depended* were never presented to the Courts in the trial and appeal of the said prior suit but were, as plaintiff contends, deliberately and intentionally withheld from presentation to the courts by plaintiff's attorney of record in the case, defendant James J. Kennedy, Jr., acting under the supervision of James J. Kennedy, to the end, on information and belief, of fraudulently playing directly into the hands of defendants, American Telephone and Telegraph Company, *et al.*, to effect the end of procuring decisions against plaintiff by the District Court and the Circuit Court of Appeals as to the matter of infringement and the matter of construction and interpretation of the claims in suit.

The patent in suit No. 1,197,460, is a pioneer and basic patent involving disclosure of subject-matter of great importance in the art to which it appertains, and the claims sued on are in keeping, broad and generic in character, and

accordingly entitled to have had all relevant facts and evidence in support of their scope fully presented to the Courts, and petitioner respectfully submits these claims should be presented for this court's consideration at this point. The claims in suit in the said prior suit define a concrete structure which for the first time in the art achieved distortionless amplification of electrical waves or impulses and the devices alleged to embody the invention and infringe have been variously employed on a large scale by defendants in said prior suit and others in radio telephone receiving and transmitting apparatus, telephone repeaters for wire lines, sound recording and reproducing apparatus including sound pictures, television and otherwise; and, according to plaintiff's information and belief, plaintiff's said invention, so embodied, has made possible and practicable trans-oceanic and intercontinental telephony as it exists today.

The claims in suit of the patent in suit were allowed by the Patent Office on the first action which accordingly entitles them to a broad construction. The claims are as follows:

> "48. A radio-electric relay, comprising in combination two radio-electro-sensitive elements, and an induction coil having separate primaries each in circuit with one of said radio-electro-sensitive elements, and a secondary, said primaries opposing each other.
>
> 49. A radio-electric relay comprising in combination two variable resistance radio-electro-sensitive elements, an induction coil having separate primaries each in circuit with one of said radio-electro-sensitive elements, and a secondary, and means for supplying current to said primaries and radio-electro-sensitive elements, said primaries opposing each other.
>
> 50. A radio-electric relay comprising in combination two selenium cells, an induction coil having separate primaries each in circuit with one of said

selenium cells, and a secondary, and means for supplying current to said primaries and selenium cells, said primaries opposing each other."

WHEREFORE your Petitioner respectfully prays that a Writ of Certiorari be issued under the Seal of this Court, directed to the United States Circuit Court of Appeals for the Second Judicial Circuit, sitting at New York, New York, commanding said court to certify and send to this court on a day to be designated, a full and complete transcript of the record and all proceedings of the Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this court; that the judgment of the Circuit Court of Appeals be reversed, and that petitioner be granted such other and further relief as may seem proper.

Dated, New York, N. Y., July 1, 1947.

THOMAS BULLITT DIXON
Petitioner, Pro Se.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

Petitioner, THOMAS BULLITT DIXON, being duly sworn, deposes and says, that he is the petitioner *pro se* herein; that he prepared the foregoing petition and that the allegations thereof are true as he verily believes.

THOMAS BULLITT DIXON
Petitioner, Pro Se.

NATHAN KORNSTEIN
Nathan Kornstein
Notary Public, State of New York
Residing in Kings Co. No. 462, Reg. No. 558-K-8
Cert. filed in N. Y. Co. No. 1222, Reg. No. 844-K-8
Commission expires March 30, 1948

[NOTARIAL SEAL]

* BRIEF IN SUPPORT OF PETITION

Statement

This Brief is in support of Petition for Writ of Certiorari to review the Judgment of the Circuit Court of Appeals for the Second Circuit in No. 91, October Term, 1946, Docket No. 20,364, filed and entered on the third day of February, 1947, affirming the Judgment of the District Court entered August 26, 1944, said judgment of the District Court having granted motion of defendants for Summary Judgment brought under Rule 56 of the Rules of Civil Procedure, and dismissing plaintiff's Re-amended Complaint of the merits.

Thomas Bullitt Dixon, as the sole and exclusive owner of United States Patent No. 1,197,460, was the plaintiff in a prior suit in Equity, E-65-141 (Prior Suit: R. p. 1), as designated in paragraph 2 (R. 6-7) of the Re-amended Complaint herein, the Bill of Complaint in which was filed February 8, 1932, for piratical Infringement of Patent in the Second Circuit, in and for the Southern District of New York, against defendants American Telephone and Telegraph Company and Western Electric Company, Incorporated, both New York Corporations, and Electrical

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* The illness of petitioner, from the effects of which he has only partly recovered, and because of which this Court issued an order dated April 30, 1947, executed by Mr. Justice JACKSON, extending the time within which to file Petition for Writ of Certiorari to and including July 2, 1947, has made it unavoidable that in preparing this supporting Brief he resorts freely to excerpts from subject-matter comprised in the Record and in his Briefs filed with the Circuit Court of Appeals, all of which he feels, owing to the peculiar circumstances, this Court will make appropriate allowances for, since the sum total amounts to only a sincere desire and effort on the part of the petitioner to make the true facts clear to the Supreme Court.

Research Products, Incorporated, a Delaware Corporation, now defunct, but whose assets have since been taken over and liabilities assumed by said Western Electric Company, Incorporated.

The cause of action comprised in the said prior suit designated in said paragraph 2 of the Re-amended Complaint herein was tried before the District Court on October 15 and 16, 1935; and upon the record in that hearing a decision was rendered by the Court on December 28th, 1935 (reported in 12 Fed. Supp. 996), pursuant to which a Final Decree was entered on February 6, 1936, holding plaintiff's claims in suit valid but not infringed by defendants.

On the 20th day of April, 1936, plaintiff appealed to the Circuit Court of Appeals; the case was argued by counsel before the Bench of the Circuit Court of Appeals on December 15, 1936, and on January 4, 1937, the Court (Judges MANTON, SWAN, and AUGUSTUS N. HAND sitting) rendered its decision (reported in 87 Fed. (2d) 1002), affirming, without opinion, the Final Decree of the District Court, and, pursuant to that decision, on January 21, 1937, issued its Mandate.

On April 17, 1937, the DECREE ON MANDATE was entered by the Clerk of the District Court whereby the said MANDATE of the Circuit Court of Appeals was made the Decree of the District Court, and it was ordered, adjudged and decreed that the defendants recover costs, as taxed by the Clerk, in the Circuit Court of Appeals together with defendants' costs as taxed by the Clerk of the District Court aggregating $221.69; and, pursuant to the order of the court, on June 9, 1937, plaintiff paid said costs to attorneys for defendants therein.

The present Action is brought to set aside as null and void the Decree in the said prior suit (namely E-65-141)

designated in paragraph 2 of the Re-amended Complaint herein on the ground that the said Decree was PROCURED TO BE MADE AS A RESULT OF FRAUD PRACTICED BY DEFENDANTS THEREIN UPON PLAINTIFF AND UPON THE COURTS, whereby plaintiff has been greatly injured and damaged and deprived of his lawful rights in the premises to have his ENTIRE CASE presented for consideration by the Courts. The sole relief plaintiff demands is A JUDGMENT TO SET ASIDE AS NULL AND VOID THE SAID DECREE AND THE ORDERING BY THE COURT OF A "NEW AND A FAIR HEARING" (R. 43-44).

In his said Re-amended Complaint plaintiff charges (R. 12-16), on information and belief, that there was a corrupt bargain between his attorneys and the attorneys for defendants whereby facts of vital and controlling importance to plaintiff's case were withheld from presentation to the Court by plaintiff's attorneys who were, on information and belief, acting in combination and cooperation with attorneys for defendants, these suppressed and concealed facts comprising, among other things, demonstrated operative utility and commercial use of the invention in suit; the suppression and concealment of facts and matters for judicial notice (R. 23-25) tending to establish the identity of the invention in suit with the alleged infringing structures; that plaintiff's attorney failed to in any way make denial of false charges by defendants' attorney, known to be false by plaintiff's said attorney, to the effect that the patent in suit (R. 33) was PURELY A PAPER PATENT, THE DEVICE OF WHICH HAD NEVER EVEN BEEN BUILT AND THAT HAD NEVER BEEN USED BY ANYBODY, and a stipulation (R. 65-66) executed on March 14, 1935, by plaintiff's then attorney, James J. Kennedy, Jr. and defendants' attorney, Henry R. Ashton, on information and be-

lief, originally proposed by said Ashton to said Kennedy, and clearly designed and *fraudulently intended*, among other things, to MISLEAD AND DECEIVE A COURT as to the meaning and scope of the claims in suit of the patent in suit.

Subject Matter

The invention in suit comprises means for effecting distortionless amplification of electrical waves or impulses and is defined by claims 48, 49 and 50 of the patent in suit as follows:

> "48. A radio-electric relay, comprising in combination two radio-electro-sensitive elements, and an induction coil having separate primaries each in circuit with one of said radio-electro-sensitive elements, and a secondary, said primaries opposing each other.
>
> 49. A radio-electric relay comprising in combination two variable resistance radio-electro-sensitive elements, an induction coil having separate primaries each in circuit with one of said radio-electro-sensitive elements, and a secondary, and means for supplying current to said primaries and radio-electro-sensitive elements, said primaries opposing each other.
>
> 50. A radio-electric relay comprising in combination two selenium cells, an induction coil having separate primaries each in circuit with one of said selenium cells, and a secondary, and means for supplying current to said primaries and selenium cells, said primaries opposing each other."

Respecting the place in the art of the Dixon invention in suit the Trial Judge, Judge WALTER C. LINDLEY, in his Opinion in which he held the claims of plaintiff's invention

in suit to be valid but not infringed by defendants, expressed himself as follows:

> "The prior art discloses the use of carbon repeaters and transmitters in push-pull systems, but the mechanical defects in amplification of currents by these devices prevented satisfactory use in such devices as Dixon contemplated. Though selenium had been recognized as of utility, it had not been suggested in the connection described by Dixon. The push-pull system was old. But Dixon by his elimination of the carbon microphone and substitution of a ray of light and selenium cells, placed in combination with the circuit of push-pull action, produced a practical amplification of a weak current without distortion and without mutilation. His utilization of selenium cells, frictionless and inertialess, avoided previously existing practical defects."
>
> "My conclusion, therefore, is that Dixon created something new, not obvious to the delvers in the art. In the past they had struggled with the problem and progressed to a certain stage, but he brought about a practical successful solution of amplification of a weak current without distortion, mutilation, or interference." (Prior Suit: R. pp. 355, 356.)

Paragraph 46 (R. 40) of the Re-amended Complaint herein relates to uses of the alleged infringing devices and reads as follows:

> "46. That the alleged infringing devices, the characteristic of which is distortionless amplification, generally known as and designated 'Push-Pull' amplifying apparatus, as alleged in the Bill of Complaint in the said prior suit of plaintiff therein, have been and are variously employed on a large scale by defendants therein and others in radio telephone receiving and transmitting apparatus, telephone repeaters for wire lines, sound recording and reproducing apparatus including sound pictures, television

and otherwise; and, on information and belief, plaintiff's said invention, so embodied, has also made possible and practicable trans-oceanic and inter-continental radio telephony as it exists today."

The Questions Presented

(a) The issue in this case can be stated in a very few words. That issue is the issue of FRAUD. Do the facts as herein shown by the Re-amended Complaint, the Affidavits of Plaintiff and others supported by the Exhibits and the statements comprised in Plaintiff's Memoranda indicate the existence in fact of the FRAUD alleged *so that there is a triable issue?* If so petitioner submits the Judgment of the Trial Court should be reversed and the case remanded to the District Court for trial just as though the Motion for Summary Judgment had never been granted.

(b) Petitioner respectfully represents that, according to his understanding, his case herein is based upon his substantive rights which Congress, in authorizing The Supreme Court to establish The Rules of Civil Procedure for District Courts, expressly exempted from the operation of these Rules, the law reading, among other things:

" . . . said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant . . ."

Assignment of Errors

1. The lower Court erred in affirming the Judgment of the District Court appealed from.

2. The lower Court erred in holding in its opinion that plaintiff had been guilty of laches during the period 1937 to 1940.

3. The lower Court erred in denying plaintiff's petition for a rehearing instead of granting same upon the grounds set forth by plaintiff.

4. The lower Court erred in ignoring and disregarding in its opinion the errors set forth in plaintiff's "Statement of Points" comprised in his "Designation of Record" (R. 295-299) reading:

"Statement of Points."

"The points upon which appellant intends to rely on this appeal are as follows:"

"1. The Court erred in not holding as fraudulent the elimination by plaintiff's former attorneys of all evidence of operative utility or commercial use of the invention in suit, whereby it was made possible for defendants' counsel to falsely represent to the Courts, without contradiction by plaintiff's attorneys, that the patent in suit was but "purely a paper patent" the device of which had never been used by anybody or even been built and that had not contributed anything to the art, whereby, among other things, A PIONEER AND GENERIC PATENT (Prior Suit: R. pp. 4, 5), the operative utility and successful commercial use of the device of which had been successfully and fully demonstrated, was falsely represented to both the District Court and Circuit Court of Appeals to be but "purely a paper patent" the device of which had never been used by anybody or even been built (R. 33), thereby deceiving and misleading the Courts, and as a result of this cooperation between counsel for defendants and counsel for plaintiff in this false representation the obtaining of favorable decisions for defendants based upon such conduct, the decisions of the District Court and that of the Circuit Court of Appeals having been each based upon these false, and as alleged by plaintiff, clearly fraudulent representations."

"2. The Court erred in failing to give due consideration and in failing to attach due weight to the fact that whereas the patent in suit is a pioneer and generic patent, the operative utility and commercial use of the device of which, as defined by the claims in suit, succeeded for the first time in solving the problem of distortionless amplification of electrical waves (Prior Suit: R. pp. 355, 356) had been fully and practically demonstrated upon the ocean cables of The Western Union Telegraph Company (R. 33) the facts as to this were completely suppressed and concealed from the knowledge of and consideration by the Courts by plaintiff's then attorney of record, defendant James J. Kennedy, Jr., acting under the supervision of James J. Kennedy, then of the defendant law partnership, Philipp, Sawyer, Rice and Kennedy."

"3. The Court erred in failing to recognize that as a result of the omissions and acts of plaintiff's attorneys, as alleged in the Re-amended Complaint herein, the generic claims of plaintiff's patent in suit were not and could not have been given the correct and broad interpretation and construction they were justly entitled to be given under the law of patents as the same has been interpreted and construed in the long line of decisions of the Supreme Court and other Courts (R. 222, 223)."

"4. The Court erred in failing to recognize and hold that the acts and omissions of plaintiff's attorneys, referred to in foregoing paragraphs 1, 2, and 3 were fully in accord with the corrupt bargain alleged in paragraph 21 (R. 12) of the Re-amended Complaint and unmistakably for the purpose of deceiving and misleading the Courts and playing directly into the hands of defendants in the trial and appeal in the former suit of plaintiff designated in paragraph 2 of the Re-amended Complaint herein."

"5. The Court erred in failing to recognize that the stipulation complained of in paragraph 43 of the Re-amended Complaint was clearly intended, among other things, to minimize the scope of argument to the effect that the alleged infringing device in fact comprised in its concrete structure two "radio-electro-sensitive elements" (R. 37-39) as defined by the claims of plaintiff's patent in suit."

"6. The Court erred in failing to recognize and hold that the facts in the case, considered fairly in their entirety in their relation to each other and *not considered merely piecemeal,* point unescapably to the conclusion of collusion, connivance and conspiracy, as alleged against defendants, so overwhelmingly that any other conclusion defies reason to satisfactorily explain, so that, accordingly, the legal presumption of innocence is overcome and overbalanced."

"7. The Court erred in failing to recognize and hold that under the law as construed by the Supreme Court in the leading case respecting the interpretation and construction of a generic patent, namely, *Hildreth* v. *Mastoras,* 257 U. S. 27, 34, 36, 37 (R. 222, 223), the successful operative utility of the device of which has been demonstrated and irrespective of the extent of commercial use or commercial success, such a patent, under the law, is entitled to a broad construction; and suppression and concealment from the Courts of the true facts in such a case cannot be excused away by any of the tricks of the most refined legal phraseology, and the facts and circumstances of the instant case, wherein the inference is unescapable that counsel for plaintiff cooperated with counsel for defendants in the suppression and concealment from the Courts of the paramount facts upon which the success of plaintiff's case necessarily depended, the only reasonable inference to be drawn is that there was collusion, connivance and conspiracy constituting

fraud between these defendants as charged in the Re-amended Complaint herein."

"8. The Court erred in holding, in effect, in its Opinion, that the failure to ask for a rehearing in this case respecting a palpable error on the part of the Court (R. 25-27) is without significance (R. 258)."

"9. The Court erred in dismissing plaintiff's Re-amended Complaint on the grounds stated by the Court in its Opinion entered August 4, 1944 (R. 253-258)."

"10. Considering the facts of the case in relationship to each other the Court erred in holding in effect, that the inference of fraud was equally balanced by the legal presumption of innocence (R. 257)."

"11. The Court erred in completely ignoring in its Opinion the fact that the patent in suit is a pioneer and generic patent, the claims in suit of which were allowed by the United States Patent Office on the first action, this of itself entitling these claims to a broad construction (R. 177)."

"12. The Court erred in holding, in effect, in its Opinion that the disclosure of the invention in suit to John J. Carty, Chief Engineer of the American Telephone and Telegraph Company, was a disclosure "to an officer of one of the defendants' subsidiaries," the affidavit of plaintiff, on the contrary, having referred specifically to said Carty, Chief Engineer of the parent corporation (R. 157, 158)."

"13. The Court erred in denying plaintiff's Motion (R. 264-273), filed October 16, 1944, for amendment of Re-amended Complaint, upon the grounds set forth in its Opinion of November 1, 1944 (R. 274-277)."

"14. The Court erred in holding in its Opinion that the facts stated in the affidavit of Catherine Dixon "are not susceptible of an inference of wrongdoing" (R. 195)."

"15. The Court erred in granting the motion for summary judgment (R. 258)."

Argument

Plaintiff-appellant respectfully represents to the Court as follows:

In their Answers the three groups of defendants each has resorted to a defense of laches.

In view of the fact that the authorities concur that laches is not just a matter of time but involves also the facts and circumstances of each individual case, it is respectfully submitted that the facts and circumstances of the present case unite in upholding plaintiff's case and in no way lend support to the contentions of defendants that plaintiff has been guilty of laches (R. 132, 133). In his petition for a rehearing the plaintiff-appellant states the facts upon which his said petition for a rehearing is based, and which he respectfully submits fully support his assignment of error No. 2.

The facts of this case, as stated in the Re-amended Complaint herein; in the memoranda and in the several Affidavits of Plaintiff, Catherine Dixon and Edward S. Mitchell, taken together with the Exhibits of Plaintiff accompanying the said affidavits, among other things, show that the charges of defendants' counsel to the effect that the Dixon patent in suit was "purely a paper patent", the device of which had never been built or used by anybody, were unqualifiedly false and, on information and belief, made with a deliberate intention to submerge the truth and mislead the Courts and rob plaintiff of remuneration.

That the failure of Plaintiff's then attorney, James J. Kennedy, Jr. to present to the Courts any of the evidence

of operative utility and/or commercial use plaintiff had placed before him of the invention in suit (R. 21, 22) constituted a failure to present ALL OF PLAINTIFF'S CASE TO THE COURT. Such conduct, as pointed out and stressed most strongly in the leading Supreme Court fraud case, *United States* v. *Throckmorton,* 98 U. S. 61, 25 L. Ed. 39 (R. 48-50), is the ground upon which decrees have been set aside and new trials granted in all of the cases the Supreme Court had examined or had been able to find. The law as stated in the *Throckmorton* case is precisely applicable to the state of facts alleged in plaintiff's Re-amended Complaint herein; and the frauds, as charged in plaintiff's Re-amended Complaint, are identical with the frauds which the Supreme Court, in the *Throckmorton* case, holds justify the setting aside of a judgment or decree and the granting of a new trial.

Petitioner's claim for relief herein consists in his fundamental right to have his case fully exhibited, this having been denied him in the trial of his said prior suit because, as alleged, of the fraud of defendants, and the relief he demands is the setting aside of the decree in said prior suit as null and void, because said decree was "procured to be made" as a result of fraud, and the ordering by the Court of "a new and a fair hearing."

In Moore's authoritative work, entitled Federal Practice, "A Treatise on The Federal Rules of Civil Procedure," the authors, in paragraph 60.03 discuss "Original Actions to Secure Relief from Judgments or Orders," and say, among other things:

> " . . . the equitable development of an *original* bill to impeach a decree for fraud, . . . was a broader development to challenge the integrity of judgments or decrees. When a court corrects a decree upon re-

hearing or bill of review it is exercising a supervisory power inherent in the court, being strictly a matter of procedure, but the original bills to impeach are founded upon an independent and substantive jurisdiction."

". . . The principal foundation for an original bill is fraud. It is quite generally held, following United States v. Throckmorton, (1878) 98 U. S. 61, 25 L. Ed. 93, that the fraud must be extrinsic to the action; . . . Typical would be any action by which a party was prevented from entering a full and fair defense or introducing relevant and material evidence . . . And, similarly, an action was permitted where the unsuccessful party's attorney in the original action connived to lose."

Respecting such original bills Mr. Chief Justice STORY in his great work on Equity Pleadings says:

"426. Fourthly; bills impeaching decrees for fraud. A bill of this sort is an original bill in the nature of a bill of review. There is no doubt of the jurisdiction of courts of equity to grant relief against a former decree, where the same has been obtained by fraud and imposition; for these will infect judgments at law and decrees of all courts; but they annul the whole in the consideration of courts of equity. This must be done by an original bill; and there is no instance of its being done by petition; . . . Where a decree has been so obtained, the court will restore the parties to their former situation, whatever their rights may be. This kind of bill may be filed without leave of the court being first obtained for the purpose, the fraud used in obtaining the decree being the principal point in issue, and being necessary to be established by proof, before the propriety of the decree can be investigated."

Plaintiff respectfully submits that the law as stated by the Supreme Court in the *Throckmorton* case, above re-

ferred to, is precisely applicable to the state of facts alleged in plaintiff's Re-Amended Complaint herein, and that the frauds, as charged in Plaintiff's Re-Amended Complaint, are identical with the frauds which the Supreme Court, in the *Throckmorton* case, holds justify the setting aside of decree and the granting of a new trial. In that leading case, in its highly illuminating opinion by Mr. Justice MILLER, the Court says, among other things:

> "There is no question of the general doctrine that fraud vitiates the most solemn contracts, documents, and even judgments. . . ."
>
> "There are no maxims of the law more firmly established, or of more value in the administration of justice, than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy; . . . But there is an admitted exception to this general rule in cases . . . where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent . . . ; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing (Citing authorities)."
>
> "In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the Court."

The right of a lower court to set aside its own judgment or decree because of fraud practiced in the procurement

thereof exists notwithstanding that such judgment or decree has been affirmed by an Appellate Court. *Kingsbury* v. *Buckner,* 134 U. S. 650—670 citing *Pacific Railroad* v. *Ketchum,* 101 U. S. 289, 296, *Pacific Railroad* v. *Missouri Pacific Railway,* 111 U. S. 505, 519.

It is respectfully submitted that the direct evidence taken together with the circumstances in this case cannot be explained on any reasonable theory of honesty or on any theory except that of collusion, conspiracy, connivance and combination, as charged in the Re-Amended Complaint herein, and that the suppression and concealment from the courts of the evidence of operative utility and commercial use of the invention in suit and the consequent misrepresentation of the facts by defendants' counsel without contradiction by plaintiff's attorney; the refusal on the part of plaintiff's attorney to petition for a rehearing for the purpose of correcting a most flagrant error on the part of the trial court—an error which uncorrected could only result in injustice of the gravest character to plaintiff's cause;—and the stipulation whereby there was eliminated from the case the patent No. RE 14,380 relating to broadcasting etc. which was one of the patents originally sued on and which defendants in their answer to plaintiff's interrogatories (R. 67-68, fols. 201-202) had admitted the manufacture and use, and the selling and the licensing of others to manufacture and use and sell the apparatus made in accordance with, all constitute facts which are wholly irreconcilable with any reasonable theory of common honesty of purpose but are obviously readily reconcilable with the charges of fraud contained in the Re-Amended Complaint; and that the total output of quicklime of the entire United States is not sufficient to enable these defendants to supply enough whitewash to make *white* the *blackness* of these facts as they must appear under the searchlight of an actual

fair trial of the case whereby all of the facts are brought out.

In *Hazel-Atlas* v. *Hartford Co.*, 322 U. S. 238, 244, 245, in reference to the power and duties of courts to set aside judgments or decrees that have been obtained through fraud, the Court, in opinion by Mr. Justice BLACK, says:

> "From the beginning there has existed alongside the term rule a rule of equity to the effect that under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry. *Marine Insurance Co.* v. *Hodgson*, 7 Cranch 332; *Marshall* v. *Holmes*, 141 U. S. 589. This equity rule, which was firmly established in English practice long before the foundation of our Republic, the courts have developed and fashioned to fulfill a universally recognized need for correcting injustices which, in certain instances, are deemed sufficiently gross to demand a departure from rigid adherence to the term rule. Out of deference to the deep-rooted policy in favor of the repose of judgments entered during past terms, courts of equity have been cautious in exercising their power over such judgments. *United States* v. *Throckmorton*, 98 U. S. 61. But where the occasion has demanded, where enforcement of the judgment is 'manifestly unconscionable,' *Pickford* v. *Talbott*, 225 U. S. 651, 657, they have wielded the power without hesitation. Litigants who have sought to invoke this equity power customarily have done so by bills of review or bills in the nature of bills of review, or by original proceedings to enjoin enforcement of a judgment. And in cases where courts have exercised the power, the relief granted has taken several forms: setting aside the judgment to permit a new trial, altering the terms of the judgment, or restraining the beneficiaries of the judgment from taking any benefit whatever from it. But whatever form the relief has taken in particular cases, the net

> result in every case has been the same: where the situation has required, the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away."

Plaintiff-appellant respectfully submits that the enforcement of the judgment in the instant case is clearly one of the cases where the enforcement of the judgment is "manifestly unconscionable".

In their Answer to plaintiff's interrogatories, dated March 21, 1932 (R. 67, 68), defendants admitted that they had made, and/or used and/or sold and/or licensed others to make and/or use, and/or sell devices embodying the alleged infringing structures in the following systems:

> "Wire telegraph,
> Wire telephone,
> Wireless broadcasting,
> Wireless transmitting,
> Wireless receiving,
> Sound recording,
> Sound reproducing,
> Public address."

whereas in the body of the stipulation between said Ashton and said Kennedy uses, etc. are confined to

> "Wire telephone,
> Sound recording,
> Sound reproducing,
> Public address systems."

Defendants argue most incredibly that this Stipulation in which four of the uses, etc. admitted and specified by the defendants were eliminated was made to save plaintiff the need to prove his case in the event of infringement being held. If the elimination of said four admitted uses, etc. was of no aid to the case of defendants why were not these four specified uses, etc. left in? Why was it necessary for

this particular bargain to be made between said Ashton and said Kennedy to the effect specifically that they would *trade* the former admissions of eight admitted uses for defendants' agreement to the effect that they *had* made the four uses specified, namely, in:

> "Wire Telephone,
> Sound Recording,
> Sound Reproducing,
> Public Address Systems."

The effect of this said stipulation was, as plaintiff therein has since realized, to release defendants therein from the possible monetary consequences of a large portion of alleged infringements, completely eliminating from the suit Broadcasting Patent No. Re.14,380—one of the patents designated in plaintiff's original Bill of Complaint in said prior suit—as well as to elude any apparent necessity to put into the record of the case certain important material facts bearing upon the responsiveness of the vacuum tube through its antenna and grid to the effects of radiant energy or radiation (these terms being synonymous) in the form of electro-magnetic waves and establish it as constituting a "radio-electro-sensitive element" in accordance with the characterization of such element in the claims of plaintiff's patent in suit and to the consequent establishment of infringement.

The importance of not relying on a paper patent in a patent infringement suit is emphasized by the courts, two illustrations as to this being here given:

> Westinghouse v. Toledo, C. C. A. 6th Circuit, 172 Fed. 371, before Lurton and Severens, Circuit Judges and Cochran, District Judge. Syllabus. 1. Patents. Construction—Paper Patents. While the fact that the device of a patent has never been put in use does not affect the validity of the patent, it is ground for giving it a strict construction.

Opinion by Cochran, District Judge. Page 372. . . . It (the patent) is what is called a "paper patent", in that it has never been used by the appellant . . . the validity of the patent, however, is not affected by its non user. Continental v. Eastern, 310 U. S. 405. But it may be said to have a bearing on its construction. In view thereof the patent should not be given a broad or liberal construction.

National v. Buckeye, C. C. A. 6, 171 Fed. 847, 853. Syllabus. 1. Patents—Construction—Paper Patents. While the fact that a patented device has never gone into use does not defeat the patent, it warrants an inference against utility, the converse of that which arises from successful commercial use, and may justify a narrow construction of the patent. Page 853 . . . The use we make of the fact that the device has never gone into actual service is in the construction or interpretation of the patent . . . it is an inference against utility from the fact of long non use, unexplained by want of means or opportunity.

Petitioner respectfully submits that it is well settled that a patent is property but what this property consists of depends upon the interpretation and construction by the Courts of the claims of the patent and interpretation and construction in turn depending upon the place in the art as shown by certain facts including demonstrated operative utility and/or commercial use, any commercial use necessarily proving operative utility.

The metes and bounds of the property comprised in a patent are set forth by the claims, not the specifications; and the claims in the instant case were drawn to cover a pioneer invention, are broad and generic in character, and were allowed by the Patent Office on the first action (Record prior suit p. 320), the novelty of the combination being such that no alleged anticipatory prior art was cited against

these claims, and claims so allowed are entitled to a broad construction (Walker on Patents, Deller's Edition, paragraph 249, p. 1218). In paragraph 168, page 810, of the same Work it is stated:

> "In case of a broad or pioneer invention, the inventor is not to be limited to the specific devices or elements described in the specification but is entitled to claim the invention broadly in terms of function of the devices, elements, etc. In *Morley Sewing Machine Co.* v. *Lancaster*, 129 U. S. 263, 266-7, 273, 284-6, 32 L. Ed. 715 (1889), Mr. Justice BLATCHFORD pointed out that Morley had a pioneer patent for his sewing machine and that he was not to be limited to the specific means described in his specification. . . ."

The consistent and persistent attempts of Counsel for defendants to distort and mirepresent the sense and meaning of the generic claims of the patent in suit it is respectfully represented indicates a fraudulent intent entirely in harmony with plaintiff's allegations respecting a corrupt bargain (R. p. 12, paragraph 21 of Re-amended Complaint).

Counsel for defendants in their arguments assert in effect that *the device of the invention in suit was never used commercially.* This statement is shown to be *unqualifiedly false* by letter of J. Wiseman, Plaintiff's Exhibit 1 annexed to his affidavit dated December 3, 1943 (R. pp. 137-138), this letter having been shown by plaintiff to plaintiff's attorney, James J. Kennedy, Jr. (as well as to James J. Kennedy, under whose supervision he was acting) long prior to the decision to exclude presentation of plaintiff's evidence as set forth in paragraph 33 of the Re-amended Complaint herein (R. pp. 21-22). This J. Wiseman letter bears date of June 18, 1907 and shows, paragraph 4 thereof, that the invention of plaintiff therein referred to was used in August, 1906 to handle actual *paid commercial business,*

copy of this J. Wiseman letter being as stated annexed to affidavit of plaintiff herein, dated December 3, 1943 (R. pp. 133-136) in which the facts as to this *commercial use* are fully set forth, counsel for defendants having accepted the said facts as stated in plaintiff's said Affidavit in open Court in Judge BRIGHT's Chambers on January 13, 1943, as *correctly stated.* Plaintiff's Exhibits 2a and 2, pages 139-140, annexed to said Affidavit give an example of the class of *actual paid commercial business handled by the Western Union Telegraph Company* during the period referred to in the said J. Wiseman letter, namely, in August, 1906.

The results of these tests beyond cavil show that the claims in suit 48, 49 and 50 of the patent in suit, which read upon the device of the patent in suit bring that patent within the scope of the decision of the Supreme Court in the case of *Hildreth* v. *Mastoras*, 257 U. S. 27, 34, 36, 37 where the Court says:

> ". . . It is not necessary, in order to sustain a generic patent, to show that the device is a commercial success. The machine patented may be imperfect in its operation; but if it embodies the generic principle, and works, that is, if it actually and mechanically performs, though only in a crude way, the important function by which it makes the substantial change claimed for it in the art, it is enough. Telephone Cases, 126 U. S. 1, 535; Mergenthaler Linotype Co. v. Press Publishing Co., 57 Fed. 502, 505." . . .
>
> ". . . As the Dickinson patent is a generic patent, the doctrine of broad equivalents properly applies here. Morley Sewing Machine Co. v. Lancaster, 129 U. S. 263, 273; Miller v. Eagle Manufacturing Co., 151 U. S. 186, 207; Paper Bag Patent Case, 210 U. S. 405."

The significance of the claims of a patent is pointed out in Walker on Patents, Delier's Edition, paragraph 165, page 770, as follows:

It is the claims of a patent which "measure the invention," and which "apprise the public of what is still left open to them." (Citing *Paper Bag Pat. Case,* 210 U. S. 405, 409; and other cases.)

The successful operative utility of the device defined by the claims in suit of the patent in suit having thus been perfectly demonstrated by successful handling of *actual paid commercial business* it is clear that irrespective of the extent of the commercial use or commercial success, such a generic patent, under the law, is entitled to a broad construction, and a construction based on *false statements* of defendants' counsel that the patent in suit is "purely a paper patent, the device of which was never used by anybody" could clearly have been obtained without denial by plaintiff's counsel only as a result of the CORRUPT AND FRAUDULENT BARGAIN alleged by plaintiff in said paragraph 21 of the Re-amended Complaint herein (R. pp. 12-13).

In his paragraphs 24 and 25 (R. pp. 14, 15) of the Re-amended Complaint herein plaintiff has claimed that if the material facts of vital and controlling importance to plaintiff's case had been presented to the Court in the Trial and Appeal of his prior suit, his case should have been and probably would have been won instead of being lost as it was. Defendants have claimed that the presentation to the Court of the evidence and facts which plaintiff has complained concerning as withheld from presentation to the Court could not have affected the result. This is clearly a matter that only the Court has a right to pass judgment on since the facts are based on plaintiff's substan-

tive and fundamental rights in the premises to have his entire case presented for consideration by the Court, and such presentation certainly *might* and probably *would* have changed the result; and depriving plaintiff of such fundamental right cannot be excused away by any sort of argumentative subterfuge on part of defendants' counsel. If the facts had been presented to the Court the Court would have had for its consideration in determining the matter of infringement the difference between a *pioneer and generic patent,* the operative utility of the device of which had been fully demonstrated and "purely a paper patent the device of which had never been used by anybody", the Trial Court as well as the Circuit Court of Appeals having reached their decision on such clearly fraudulent misrepresentation of plaintiff's case.

In vain and absurd attempts, for the purposes of their argumentative disquisitions, to define the law of patents, counsel for defendants have even attempted to put themselves in the place of the Supreme Court itself in attempted definitions of what the claims of the patent in suit stand for. While according to the Supreme Court the *claims* of a patent, not its *specifications,* measure the invention (*Smith* v. *Snow, et al.,* 294 U. S. 1) yet counsel for defendants herein attempted to reverse the Supreme Court so that for the fraudulent intentions of their arguments it will in effect read the *specifications* of a patent, not its *claims,* measure the invention. As applicable to such argumentative nonsense, in *White* v. *Dunbar,* 119 U. S. 47, the Supreme Court says:

> "Some persons seem to suppose that a claim in a patent is like a nose of wax, which may be turned and twisted in any direction, by merely referring to the specification so as to make it include something more than, or something different from, what its

> words express. The context may undoubtedly be resorted to, and often is resorted to, for the purpose of better understanding the meaning of the claim; but not for the purpose of changing it, and making it different from what it is. The claim is a statutory requirement, prescribed for the very purpose of making the patentee define precisely what his invention is; and it is unjust to the public as well as an evasion of the law, to construe it in a manner different from the plain import of its terms."

Referring to plaintiff's charges to effect that failure on the part of plaintiff's attorney to petition for a rehearing after decision of Trial Court was fraudulent in its intention it is clear that the decision of Trial Court as to infringement was clearly based not on the broad claims as they actually exist of the patent in suit but on statement of defendants' expert Johnson (R. pp. 25-27) which inject the factor of motion into the claims. If a rehearing had been asked for and granted the Court's mental attitude might very reasonably and very probably have undergone such a change that it could readily have made a distinction between the broad claims of the patent in suit and the artificially and erroneously narrowed claims as drawn in the mind of the Court by the interpretation based on the language of defendants' expert Johnson. Defendants admit the Johnson language to be correctly quoted in paragraph 37 of the Re-amended Complaint (R. pp. 25-26-27) yet attempt to support their position in an effort to substitute their own re-write of these claims as substitutes for the broad claims actually allowed by the Patent Office, on first action, in accordance with the law of the land. Plaintiff represents that it can well be assumed that if the patent had been supported by the evidence of operative utility and commercial use that plaintiff had placed before his attorneys the Trial Judge would have had great difficulty in

giving the narrow construction to the claims that he did give and plaintiff respectfully submits that this entire matter of failure on the part of highly skilled patent attorneys in charge of plaintiff's suit to petition for a re-hearing *reeks with fraud* in accordance with the charges comprised in said paragraph 21 of the Re-amended Complaint herein (R. pp. 12-13). The importance and necessity for a re-hearing following the decision of the Trial Court is thus apparent, and the attempts of defendants' counsel and of defendant Kennedy to make of the Trial Court's error a trifling matter is well in keeping with their other efforts to deceive and mislead the Courts.

Defendants' contentions based on allegation that issue in prior suit was whether electric current was equivalent to radiation as set forth in claims of patent in suit or whether patentee had such electric current in contemplation are matters to be fairly decided only in patent infringement suit, present suit depending for a correct Court decision on question of whether facts as a whole indicate that inference is justified that decree complained of was procured to be made as a result of fraud as charged by plaintiff.

Irrespective of whether plaintiff's allegations respecting the legal effect of the stipulation (R. prior suit p. 28, fols. 82-84) are correct or incorrect the intention of defendants by means of the stipulation to defraud plaintiff by elimination of every reference to wireless or radio in the body of the stipulation and specifying admitted uses so as to include only wire systems is clearly manifest, the stipulation thus being clearly intended to function as a highly efficient blinder for the Trial Court to prevent the Court from arriving at any correct interpretation of the meaning of the claims in suit and thereby arriving at an interpretation favorable to the case of plaintiff.

Plaintiff respectfully requests the Court to read with care paragraph 36 of the Re-amended Complaint (R. pp. 23-25 and paragraph 37 thereof, pp. 25-27) which refer respectively to matters of judicial notice and matter of rehearing, which plaintiff has alleged should have been petitioned for and granted.

It appears inconceivable in view of the circumstances as shown in Record of this case that the leaving out of all of plaintiff's evidence of operative utility and/or commercial use could have been the result of anything other than some sort of corrupt bargain. Just what the corrupt bargain may have been plaintiff is without information, but in such circumstances, fortunately for the cause of justice, the law allows resort to circumstantial evidence. In this connection, in the case of *Brach et al.* v. *Moen,* 35 F. (2d) 475, 482, the Court says:

> "Fraud is a sinister thing, difficult of apprehension. It is seldom there is any direct evidence thereof, but it cannot be proved by mere suspicion. It is generally established by legitimate inferences arising from circumstantial evidence. Mammoth Oil Co. et al. v. United States, 275 U. S. 13, 48 S. Ct. 1, 72 L. Ed. 137."

The legitimate inference is surely that the leaving out of plaintiff's evidence referred to in Record was due to fraud and this fraud would clearly have been of a suicidal character unless the further inference is drawn that it resulted from collusion, connivance and conspiracy, as charged in the Re-amended Complaint. Any other view fails to make sense. And in a much earlier case, *Castle et al.* v. *Bullard,* 23 Howard, 172, 187, the Supreme Court says:

> "Actions of this description, however, where fraud is of the essence of the charge, necessarily

> give rise to a wide range of investigation, for the reason that the intent of the defendant is, more or less, involved in the issue. Experience shows that positive proof of fraudulent acts is not generally to be expected, and for that reason, among others, the law allows a resort to circumstances, as the means of ascertaining the truth. Great latitude, says Mr. Starkie, is justly allowed by the law to the reception of indirect or circumstantial evidence, the aid of which is constantly required, not merely for the purpose of remedying the want of direct evidence, but of supplying an invaluable protection against imposition. 1 Stark. Ev., p. 58.
>
> Whenever the necessity arises for a resort to circumstantial evidence, either from the nature of the inquiry or the failure of direct proof, objections to testimony on the ground of irrelevancy are not favored, for the reason that the force and effect of circumstantial facts usually and almost necessarily depend upon their connection with each other. Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof."

According to the highest legal authorities, foremost among which stands Mr. Chief Justice STORY, there is a very wide and controlling distinction to be drawn between evidence in law and evidence in equity. Plaintiff's present action, is obviously, purely in *equity*, not *law*. Said Mr. Chief Justice STORY:

> ". . . But courts of equity will act upon circumstances, as presumptions of fraud, where courts of law would not deem them satisfactory proofs. In other words, courts of equity will grant relief upon the ground of fraud, established by presumptive evidence, which evidence courts of law would not always deem sufficient proof to justify a verdict at law. . ."

Commentaries On Equity Jurisprudence, 11th Edition, under heading Actual Fraud, paragraph 190 * (R. 189).

The most recent case coming to the knowledge of the plaintiff wherein the force of circumstantial evidence prevailed is that of *Keviczky* v. *Lorber et al.,* Decided April 15, 1943, by the New York Court of Appeals, 290 N. Y. 297, 302, opinion by Judge FINCH, where the Court says (R. 190):

> "Direct and positive proof of a conspiracy to cheat and defraud such as is here presented is seldom, if ever, attained. Conspiracies of this nature ordinarily are not conceived and executed openly but in secret. Usually the only evidence available is that of disconnected acts on the part of the individual conspirators, which acts, however, when taken together in connection with each other, show the conspiracy to secure a particular result quite as satisfactorily and conclusively as more direct proof (People, etc. v. Flack, 125 N. Y., 324; People, etc., v. Van Tassel, 156 N. Y., 561)."

Petitioner believes it appropriate to point out that in all of their papers on their motion for Summary Judgment defendants have assumed the attitude of injured innocence and appear to pretend to take it for granted that the issue of FRAUD, aside from general denials, can, for the most part, be ignored by them. The circumstances of the instant case, however, are such that, as expressed by the Circuit Court of Appeals of the Eighth Circuit, in the case of *United States* v. *Mammoth Oil Co.,* 14 F. (2d) 705, and affirmed by the Supreme Court in *Mammoth Oil Co.* v. *United States,* 275 U. S. 13, 14, there can be no escape, on

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* As plaintiff-appellant, who is not a lawyer, understands, since Mr. Chief Justice STORY's time, courts of law have more and more followed courts of equity as to such matters.

any reasonable ground, from the conclusion as to the *fraud* perpetrated by defendants herein as charged. In that decision the Court says, at page 717 (R. 230, 231):

> " . . . While the law presumes the good faith of business transactions, fraud may be the only legitimate and proper inference that can be drawn from the circumstances disclosed. It is not necessary in a civil action that fraud be established beyond a reasonable doubt. . . . " (Citing *Jones* v. *Simpson,* 116 U. S. 609, 615, 6 S. Ct. 538, 29 L. Ed. 742 and other cases.)

Conclusion

It is respectfully submitted that the petition should be granted as prayed for.

Dated: New York, July 1, 1947.

Respectfully submitted,

THOMAS BULLITT DIXON,
Petitioner, Pro Se.